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No. 83-61

In the Supreme Court of the United States

OCTOBER TERM, 1983

O'NEAL WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether requiring petitioner to read in open court an irrelevant passage from a news magazine for the purpose of voice identification violated his Fifth Amendment privilege against self-incrimination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B14) is reported at 704 F.2d 315.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1983 (Pet. App. B1). A petition for rehearing was denied on May 18, 1983 (Pet. App. C1). The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of attempting to possess cocaine, in violation of 21

U.S.C. 844 and 846. He was sentenced to an eight-month term of imprisonment and a fine of $1,000. Pet. App. A1-A2.[1]

1. Petitioner was apprehended by federal agents and Michigan state police in the final stages of an investigation of the involvement of certain individuals, including Ronald Conn and Paul Arnott, in a cocaine trafficking scheme. At the conclusion of the investigation, law enforcement officials executed a warrant authorizing a search of Conn's residence. During the search, Michigan State Police Sergeant Bertee answered the telephone. Pet. App. B2. At trial, Sergeant Bertee testified about the ensuing conversation (*id.* at B1-B2):

Q. What did you say when you picked the phone up?

A. "Hello."

Q. And the party on the other line, what did that person say?

A. Said, "Hello, Paul. This is Jack."

Q. And what did you say?

A. I said, "yeah, Jack."

* * * * *

Q. After you said, "Yeah, Jack," what did the caller say?

A. At this point, he said, "This doesn't sound like Paul." I told him * * * I told him at that time I had a cold, I just got back from Florida.

* * * * *

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[1]Petitioner was tried together with two co-defendants, Sandra Hancock and Paul Arnott. A petition for certiorari from the judgment affirming Arnott's conviction is presently pending before the Court, No. 82-2028.

Q. What did the caller then say, after you told him you had just come back from Florida?

A. The caller asked if he could come up and pick up an ounce of snow.

* * * * *

Q. After this caller called and indicated that he wanted to come over and pick up some snow, what did you tell him?

A. I told him to come on up.

Q. Was there anything else said by either of you?

A. No.

Approximately 15 to 45 minutes after the telephone call, petitioner drove into the driveway of Conn's residence. Two officers confronted him, ordered him from his vehicle, and seized a weapon that protruded partially from under the seat (Pet. App. B2). After petitioner identified himself as Jack Williams and produced a driver's license in the name of O'Neal Williams, he was escorted into the Conn residence. When Sergeant Bertee heard petitioner speak, he recognized his voice as that of the telephone caller and stated "You are Jack," to which petitioner replied, "Yeah, I'm Jack Williams." The agents confiscated $3,400 and a business card from petitioner's person. A telephone number written on the reverse side of the card matched the telephone number corresponding to the name "Jack" written on the back of a business card taken from Arnott. *Id.* at B3.

At trial, Sergeant Bertee described the voice on the telephone as a "distinctive * * * gravelly-type voice" with a Southern drawl. After the defense had rested its case, the government moved on rebuttal to introduce an exemplar of petitioner's voice "for the purposes of the jury hearing his voice." Over objection, the district court granted the

government's motion and compelled petitioner to read a short innocuous passage from *Time* magazine. Pet. App. B3.[2]

2. The court of appeals rejected petitioner's contention that this reading violated his Fifth Amendment privilege against self-incrimination, and it affirmed his conviction (Pet. App. B1-B14). The court observed that this Court has held, in a pretrial context, that the distinctive characteristics of an individual's voice and speech are identifiable *physical* characteristics, the compelled demonstration of which infringes no Fifth Amendment privilege (*id.* at B4). The court also stated that "federal and state forums have universally adjudged that compelling a defendant to actively cooperate in non-communicative activity in the presence of the jury does not abdicate fifth amendment guarantees" (*id.* at B7). The court of appeals concluded that requiring petitioner to provide a voice exemplar in the presence of the jury was not testimonial and therefore did not implicate any Fifth Amendment privilege, explaining that there was no basis for distinguishing this case from the provision of an exemplar before trial (*id.* at B10-B11).

ARGUMENT

Petitioner contends (Pet. 4-8) that being required to provide a voice exemplar before a jury violates his Fifth Amendment privilege against self-incrimination. As petitioner concedes (Pet. 4-5), the decision below does not

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[2]The passage, consisting of four sentences and 85 words concerned the number, value, and enthusiasm for recognized breeds of cats in the United States (Pet. App. B3).

conflict with any federal court decision and, indeed, is supported by every state court decision that has considered the question. Accordingly, review by this Court is unwarranted.

This Court has held that there is no Fifth Amendment bar to requiring an individual to furnish a voice exemplar either during a lineup (*United States* v. *Wade*, 388 U.S. 218, 222-223 (1967)) or before a grand jury (*United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973)). This is because the individual is required to use his voice only "as an identifying physical characteristic." *Wade*, 388 U.S. at 222-223. The voice exemplar, like the provision of any other physical characteristic, is not "testimonial," and therefore it does not implicate the Fifth Amendment protection against self-incrimination. Providing the voice exemplar in front of a jury, in the form of reading an article about cats, does not transform it into a "testimonial" act anymore than would requiring the defendant to perform other non-communicative acts, such as putting on a hat or a wig. See Pet. App. B7-B8.[3] Thus, the Second Circuit found "no constitutional infirmity" in requiring a voice exemplar in open court (*United States* v. *Brown*, 644 F.2d 101, 103, cert. denied, 454 U.S. 881 (1981)), and several state courts have upheld such exemplars. See, *e.g.*, *Oregon* v. *Reynolds*, 43 Or. App. 619, 603 P.2d 1223 (1979), aff'd, 289 Or. 533, 614 P.2d 1158

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[3]Petitioner's contention (Pet. 5-6) that speaking in court produces "demeanor evidence" misses the mark. As the court of appeals explained (Pet. App. B10-B11), demeanor evidence is relevant when the witness offers testimony, and his demeanor during the testimony is considered relevant to assessing his credibility. The jury in this case was expressly informed that petitioner was not testifying, but was reading the passage only so that the jury could hear his voice (see Tr 1151). Moreover, the type of demeanor evidence referred to by petitioner is equally available from a tape recording of a voice exemplar or, indeed, from visual observation of the defendant in the courtroom.

(1980); *Lusk* v. *State*, 367 So. 2d 1088 (Fla. Dist. Ct. App. 1979); *Coffey* v. *State*, 267 Ark. 687, 550 S.W. 2d 778 (1977).

Petitioner relies primarily (Pet. 7) on the dissenting opinions in *United States* v. *Wade, supra*, to suggest that this Court has explicitly limited the use of voice exemplars to pretrial settings.[4] This suggestion is without foundation. The dissenters proferred no basis for distinguishing between the pretrial setting and the trial itself; their view was that requiring a voice exemplar was unconstitutional even at the lineup stage, and that view was rejected by a majority of the Court. The majority opinion certainly does not suggest that the particular setting in *Wade* was significant to the disposition of the issue. The Court emphasized only the nontestimonial nature of the compulsion. *United States* v. *Wade*, 388 U.S. at 222-223. And that conclusion was reaffirmed in *Dionisio*. Thus, the decision below is fully supported by decisions of this Court, and there is no occasion for further review.

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[4]Petitioner's reliance on *United States* v. *Greer*, 3 C.M.A. 576, 13 C.M.R. 132 (1953), is misplaced. The Court of Military Appeals itself has recognized that *Greer* lacks any continuing precedential value in light of this Court's subsequent decisions in *Wade* and *Dionisio*. See *United States* v. *Armstrong*, 9 M.J. 374, 376-378 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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